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In The

Supreme Court of the United States

October Term, 1996

MIDWEST PRIDE IV AND JAMES KEATON,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an obscenity prosecution, do the First, Sixth and Fourteenth Amendments entitle the accused, upon timely request, to have the jury instructed to the effect that, if it is unable to determine the contemporary community standards against which the charged materials must be evaluated, it must return a verdict of not guilty?

LIST OF PARTIES

The parties to the proceeding in the Ohio Supreme Court were Midwest Pride IV, Inc. and James Keaton as appellants and the State of Ohio as appellee.

There are no parent or subsidiary companies of Midwest Pride, IV, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 14

APPENDICES

Opinion of the Court of Appeals for the Twelfth Appellate District (August 26, 1996) 1a

Judgment Entry of the Court of Appeals for the Twelfth Appellate District (August 26, 1996) 18a

Entry of the Supreme Court of Ohio (January 15, 1997) 19a

TABLE OF CONTENTS (cont'd)

Judgment Entry of Conviction of the Court of Common Pleas of Fayette County (September 15, 1995) 20a

Entry Denying Application for Reconsideration of the Court of Appeals of Fayette County (October 3, 1996) 23a

Journal Entry of the Court of Common Pleas of Fayette County (September 1, 1994) 25a

Transcripts relative to Jury Instructions 32a

Assignments of Error to Court of Appeals for the Twelfth Appellate District 36a

Propositions of Law to the Ohio Supreme Court . . 37a

Constitution of the United States

First Amendment 39a

Sixth Amendment 39a

Fourteenth Amendment 39a

Ohio Revised Code

§ 2907.32 Ohio Rev. Code 41a

§ 2907.01 Ohio Rev. Code 43a

TABLE OF AUTHORITIES

Page

CASES

Commonwealth v. Trainor, 374 Mass. 796, 374 N.E.2d. 1216 (1978) 12

Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974) 8-10, 14

Hawaii v. Kam, 68 Haw. 631, 726 P.2d. 263 (1986) 12

Johnson v. State, 760 S.W.2d 797 (Tex App.-Dallas 1988) 12

Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680 (1973) 9

Miller v. California, 413 U.S. 15, 24 (1973) . 3, 6, 8, 14

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 27 L.Ed.2d. 446 (1973) 8, 10, 14

Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918 (1987) 8

Smith v. United States, 431 U.S. 291 (1977) 8

United States v. 2,200 Paper Back Books, 565 F.2d 566 (9th Cir. 1977) 8, 10, 11

TABLE OF AUTHORITIES (cont'd)

United States v. Easley, 927 F.2d 1442 (8th Cir. 1991) 12

United States v. Thomas, 74 F.3d 701 (6th Cir. 1996) 12

United States v. Various Articles of Obscene Merchandise, 709 F.2d 132 (2d Cir. 1983) 8, 9

CONSTITUTIONAL PROVISIONS

United States Const., amend. I 2, 3

United States Const., amend. VI 2

United States Const., amend. XIV 2

STATUTORY AND REGULATORY PROVISIONS

28 U.S.C. §1257 2

Ohio Rev. Code §2907.01 2

Ohio Rev. Code §2907.32 . . . . . 2, 3

TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS

R. Bell, Determining Community Standards, 63 ABA Journal 1202, (1977) 11

D. Chiu, Comment: Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway, 36 Santa Clara L. Rev. 185 (1995) 11

The Hon. J. Clark, The "Community Standard" in the Trial of Obscenity Cases - a Mandate for Empirical Evidence in Search of the Truth, 20 Ohio N.U.L. Rev. 13, 26 (1993) 11

D. Linz, Discrepancies Between Legal Code and Community Standards for Sexual Violence: An Empirical Challenge to Traditional Assumption in Obscenity Law, 29 Law & Society Rev. 127 (1995) 12

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In The

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October Term, 1996

MIDWEST PRIDE IV AND JAMES KEATON,

Petitioners,

vs.

STATE OF OHIO,

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Petition For A Writ of Certiorari
To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Midwest Pride IV, Inc. and James Keaton, petitioners, pray that a writ of certiorari issue to review the judgment of the Ohio Supreme Court entered in this case on January 15, 1997.

OPINIONS BELOW

The order of the Ohio Supreme Court dismissing the appeal for the reason that no substantial constitutional question exists is set forth in the Appendix at App. 19. The opinion and judgment entry of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District is set forth at App. 1. The judgment entry denying petitioners' application for reconsideration is set forth at App. 23. The judgment entry of petitioners' conviction is set forth at App. 20. The September 1, 1994 order of the trial court ruling on plaintiff's and defendants' pretrial motions is set forth at App. 25.

JURISDICTION

The judgment entry of conviction of the Court of Common Pleas of Fayette County, Ohio was entered on September 15, 1995. App. 20. The opinion and judgment of the Court of Appeals for Fayette County, Ohio, Twelfth District was entered on August 26, 1996. App. 1. The judgment of the Ohio Supreme Court was entered on January 15, 1997. App. at 19. This Court has jurisdiction to review the judgment rendered by the highest court of a state by writ of certiorari, pursuant to 28 U.S.C. §1257, where rights are claimed under the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution and §§ 2907.32, 2907.01, Ohio Rev. Code are reprinted in the Appendix to the petition at App. 39 to 45.

STATEMENT OF THE CASE

Petitioners were indicted under Ohio Rev. Code §2907.32 for selling two videotapes and a magazine alleged to be obscene. Prior to trial, the court granted the prosecution's motion in limine forbidding defense counsel "to suggest" that the First Amendment provides a defense or "that freedom of expression is relevant with respect to obscenity." (Order, September 1, 1994, App. at 25) Petitioners were tried by jury in the Fayette County, Ohio Court of Common Pleas and found guilty of pandering obscenity.

This Court propounded the constitutional test defining obscenity in Miller v. California, 413 U.S. 15, 24 (1973). The Miller test directs that the jury, in determining whether the materials at issue are obscene, is to evaluate the materials' appeal to prurient interest and the materials' patent offensiveness by applying contemporary community standards. "Community standards" serve as the yardstick by which the jury is to evaluate the expression forming the basis of the prosecution.

In the prosecution below, the state introduced no evidence of the relevant community standards. Rather, its total evidence consisted of two videotapes and a magazine alleged to be obscene, the testimony of a police officer regarding the investigation leading up to petitioners' obscenity charges, and the testimony of a second officer regarding his purchase of the materials at issue from a bookstore named the Lion's Den. Not a word or document was offered by the prosecution as evidence of the relevant community standards the jury

was to apply.[1]

Leslie Walp, an employee of the Lion's Den and a witness called by the prosecution, did, however, testify on cross-examination and redirect examination about the patrons of the Lion's Den. Walp testified, among other things, that 2,500 to 3,000 people from all walks of life patronized the bookstore each week (TR 578). She explained that the bookstore had conducted an informal survey and found its patrons represented a cross section of the United States, (TR 579), and included many members of the Fayette County community. (TR 580). Ms. Walp explained that she saw many of her customers in the community with their families, that many male customers from the community brought their wives into the store and that many of the store's customers were women from the community. *Ibid.* This was the only evidence admitted regarding the contemporary community standards of Fayette County.

Petitioners timely filed proposed jury instructions - including a request that the jury be instructed that if it were unable to determine what the contemporary community standards were, then it was required to return an acquittal. The trial court refused to include any such instruction in its charge to the jury. (T. 620-21). The petitioners objected - arguing that an instruction which informs the jury that, if it cannot determine the community standards, it must find the defendants not guilty, is constitutionally required. Specifically defense counsel advised the court:

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[1] Petitioners made a number of attempts to introduce evidence of the contemporary community standards. The court, for the most part, prohibited them from offering such evidence. (See, TR 574, 576, 581, 619).

> [T]he instructions that . . . inform[ ] the jury that if they cannot determine the community standards, they must find the defendants not guilty. We believe those kind[ ] of instructions [or] . . . some instruction to that effect is constitutionally . . . required.

(TR 642)

Indeed, the court's refusal to give the requested instruction permitted the prosecution in closing argument, to disclaim any burden of proof on the issue of community standards and to communicate to the jury that the jury was, in fact, required to formulate a standard by which the materials were to be evaluated. The prosecutor told the jury:

> But let me say this Ladies and Gentlemen that I'm not required to place before you the community standard. The work speaks for itself. The work communicates to you its success or failure in meeting these tests. It is not an element of this offense for me to place before you the community standard.

(TR 704-705). (Emphasis added). The prosecutor continued:

> Those contemporary community standards that you as a jury will find . . . [Y]ou will determine those standards based upon your experience in the community and it is not required that the state produce those for you as an element of this offense in order for you to return a guilty verdict.

(TR 706) (emphasis added).

The prosecution quite bluntly and plainly told the jury that the prosecution bore no burden of proof on contemporary community standards, a critical element of the crime of pandering obscenity.

Petitioners moved for a mistrial emphasizing that a violation of the contemporary community standards was critical to proving the first two prongs of the Miller test, and therefore, was an element of the obscenity offense which the prosecution bore the burden of proving beyond a reasonable doubt. (TR 709-710). The trial court overruled the motion for mistrial and gave no remedial instructions. (TR 710). The jury was sent to deliberate.

In the midst of its deliberations, the jury submitted questions about the community standards it was to apply. The jury wrote:

> What is the definition of community as it is used in the law? Does it mean in the country, the state, the county or city?

(TR 725). The judge advised the jurors it could not answer its question (TR 728), and soon thereafter, the jury returned a verdict of guilty against both petitioners.

The court sentenced both petitioners to the maximum penalty - levying a $5,000.00 fine on Midwest Pride IV, Inc. and sentencing James Keaton to six months in jail and a $1,000.00 fine.

The petitioners filed timely appeals to the Fayette County Court of Appeals for the Twelfth District. On August 26, 1996, the appellate court affirmed both convictions. Petitioners' motion for reconsideration of the appellate court's decision was denied on October 3, 1996.

Petitioners filed a memorandum in support of jurisdiction seeking review of their convictions in the Ohio Supreme Court. The Ohio Supreme Court dismissed petitioners' appeal for want of a substantial constitutional question on January 15, 1997.

On January 13, 1997, petitioner Keaton filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Ohio. Keaton's petition was denied by the district court on February 5, 1997. An appeal from the district court's denial of Keaton's petition raising this issue as well as others is currently pending before the Sixth Circuit Court of Appeals. (Case No. 97-3128).

Petitioners seek review by writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

The law of obscenity treads challenging terrain. The risk posed by an obscenity prosecution unrestricted by necessary tethers strikes dead center at the First Amendment. Matters of procedure and evidence in obscenity prosecutions assume particular importance in safeguarding free expression. Thus, the law defining the constitutional reach of state and federal obscenity laws has created complexities and anomalies unique to it. This case demonstrates one of those anomalies and presents this Court with the opportunity to clarify the need for constitutionally required jury instructions regarding the element of community standards in state and federal obscenity prosecutions.

This Court developed the current test for defining obscenity in Miller v. California, 413 U.S. 15 (1973). In

the Miller test for obscenity, the community standards by which the materials' appeal to prurient interest and patent offensiveness are to be evaluated constitute a factual determination, elemental to the jury's assessment of obscenity. Miller, 413 U.S. at 37; Smith v. United States, 431 U.S. 291, 300-01 (1977); Pope v. Illinois, 481 U.S. 497, 500, 107 S.Ct. 1918, 1920 (1987). As such, the relevant community standards are an essential element of obscenity on which the government has the burden of proof and persuasion. United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 135 (2d Cir. 1983); United States v. 2,200 Paper Back Books, 565 F.2d 566, 570 (9th Cir. 1977).

The way in which the prosecution can discharge its burden of proof in an obscenity prosecution requires attention to the two components of the burden of proof: the burden of production and the burden of persuasion. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973) this Court held that the prosecution was not constitutionally required to produce expert evidence on the issue of obscenity to survive a directed verdict, while in Hamling v. United States, 418 U.S. 87, 104 (1974), this Court specifically ruled that the prosecution was not constitutionally required to produce evidence of the community standards, but could rely on the jury to use its own knowledge to supply this element of the obscenity test. Thus, under Hamling and Paris, the prosecution need not produce expert evidence on community standards to meet its burden of production. But the holdings in Hamling and Paris do not release the prosecution from its burden of persuasion and its ultimate burden of proof to demonstrate the community standards by which the materials must be assessed by the jury. Miller makes clear that the community standards are an essential element of the offense requiring a factual finding by the jury.

The law regarding the way in which a jury may find and determine the appropriate community standards to be applied in its determination of obscenity is unique. Jurors may derive the relevant community standard to be applied based on expert testimony or other evidence adduced at trial, Kaplan v. California, 413 U.S. 115, 120-21, 93 S.Ct. 2680, 2684-2685 (1973), or they may "draw on [their] own knowledge of the view of the average person in the community or vicinage from which [they] come[ ] for making the required determination." Hamling v. United States 418 U.S. 87, 104, 94 S.Ct. 2887, 2901 (1974).

Thus, the prosecution may constitutionally meet its burden of proof by simply allowing the jury to supply an essential element of the offense. The jury can make its factual finding of the requisite standards not on the basis of the evidence presented in the courtroom, but rather on their own extrinsic knowledge of the community.

Under either mode of determining the relevant community standards, however, those standards remain an element of the offense which the prosecution must prove beyond a reasonable doubt.

Thus, if the prosecution presents no evidence of the relevant community standard to be applied and, instead, chooses to rely on the jury's own knowledge of the "vicinage" to divine the appropriate standards, the prosecution runs the risk that it will fail to sustain its burden of persuasion if the jury determines it cannot arrive at an applicable community standard by which the materials at issue must be judged. The Second Circuit Court of Appeals in Various Articles explained:

> The government bears the burden of proving all three elements of obscenity to the satisfaction of

the trier of fact, United States v. 2,200 Paper Back Books, 565 F.2d 566, 570 (9th Cir. 1977), but it is not constitutionally required to introduce evidence of community standards. Hamling v. United States, 418 U.S. 87, 104, 94 S.Ct. 2887, 2900, 41 L.Ed.2d. 590 (1974). The materials, if "hard core," may speak for themselves, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 563 n.6, 93 S.Ct. 2628, 2634 n.6, 27 L.Ed.2d. 446 (1973). While the materials provide the best evidence of their substantive content, they do not supply any information about the community standards by which they are to be judged. United States v. 2,200 Paper Back Books, supra, 565 F.2d at 570. The trier is free to decide that the government has failed to sustain its burden of proving that the materials, although unprotected by virtue of their "hard core" content, are patently offensive to the average member of the community. In order to make that determination, he may utilize his own sense of the views of the hypothetical "average person in the community," a flexible concept that requires taking into account such variables as the characteristics of the community, the differing attitudes within it, the extent to which persons reveal their true opinions, and the nature of the "hard core" materials under attack. To arrive at a measure of community tolerance of pornographic material, the [finder of fact] may rely upon his own experience in the community and decide as best he can what most people seem to think about such materials. If, on the other hand, he has little or no knowledge of their views, he may turn to opinion proof and, if the government fails to offer such proof, he may be relegated to finding that it has failed to sustain its burden. See, e.g., United States v. 2,200 Paper Back Books, supra, 565 F.2d

at 570.

Id. at 135-36. (Footnote omitted) (emphasis added).

Without evidence of community standards presented by the prosecution, the jury's task of determining the relevant community standard to be applied is a prickly and difficult one. Those commentators exploring community standards in the context of obscenity have identified a range of problems in defining a standard. For instance, one commentator observes that if a community is polarized in its attitudes regarding sexually explicit materials - what he dubs a "dissensus" in the community - there can be no community standard to apply in determining a material's obscenity. R. Bell, Determining Community Standards, 63 ABA Journal 1202, 1204-1205 (1977). An Ohio trial judge in his thesis for a Master of Judicial Studies identifies the fallacies and misconceptions perpetrated by allowing a panel of jurors to attempt to formulate a community standard without any outside evidence of that standard. The Hon. J. Clark, The "Community Standard" in the Trial of Obscenity Cases - a Mandate for Empirical Evidence in Search of the Truth, 20 Ohio N.U.L. Rev. 13, 26 (1993). Yet another article discusses the difficulties and incongruities raised in asking jurors to formulate and apply a community standard to varied forms of communication now possible, given new technologies such as the Internet. D. Chiu, Comment: Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway, 36 Santa Clara L. Rev. 185 (1995), See, United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). And others have explored the fragile dynamic of the community standard itself and have encountered serious questions about the individual juror's perception of the standard as opposed to the actual standard itself. D. Linz, Discrepancies Between

Legal Code and Community Standards for Sexual Violence: An Empirical Challenge to Traditional Assumption in Obscenity Law, 29 Law & Society Rev. 127 (1995).

Because of the unusual role the jury occupies in being permitted to make a factual finding not on the evidence adduced but rather on some assumed knowledge on its part, the instructions given to it by the court are particularly significant. For the possibility exists and needs to be accounted for that the jury does not have an understanding or an agreement on the relevant community standards to be applied. Thus, the jury needs to be instructed that if it is unable to determine the relevant community standard by which the materials are to be evaluated, then it must return a verdict of not guilty.

Two courts have found such an instruction to be required. Hawaii v. Kam, 68 Haw. 631, 634, 726 P.2d. 263, 265 (1986); Commonwealth v. Trainor, 374 Mass. 796, 800, 374 N.E.2d. 1216, 1219 (1978). Two other courts, however, have held precisely the opposite - finding, in contradiction to the above-cited studies and articles, that it is unlikely that a jury would be unable to determine the relevant community standard. United States v. Easley, 927 F.2d 1442, 1449-50 (8th Cir. 1991); Johnson v. State, 760 S.W. 2d 797, 801 (Tex App.-Dallas 1988).

Given the very real and important concerns about the jury's unique role in determining the relevant community standard and the problems it can encounter in doing so, petitioners requested that the trial court instruct the jury that if it were unable to determine the relevant contemporary community standards by which the materials were to be judged, then it must acquit.

The trial court's refusal to give the requested instruction on community standards was particularly prejudicial in the case at bar. The prosecution produced not a shred of evidence regarding community standards. The defense, on the other hand, attempted to offer relevant, probative evidence in the form of comparable material adjudged by Fayette County juries not to be obscene, only to be denied the opportunity to introduce such evidence.

The only evidence regarding community standards was elicited on the cross and redirect examination of a Lion's Den employee who testified about the sizeable number of patrons - both men and women - from the Fayette County Community who patronized the store (T. 579-80).

As a consequence of the trial court's refusal to give the defense's requested instruction, the prosecutor was free to argue that that the community standard "was not an element of the offense" (T. 705) and that "it [was] not required that the state produce those [standards] for you as an element of this offense." (T. 706). Petitioners' motion for mistrial was denied without any curative instruction.

Indeed, the jury evinced confusion about its role in fashioning a community standard in the course of its deliberations - submitting questions about those standards to the court.

Thus , the record quite compellingly demonstrates the particular need for instructing the jury on this issue.

Without appropriate instruction, a jury could easily lose its way in evaluating whether the expression before it constitutes protected speech or obscenity. For while it

is one thing to find that the prosecution's failure to adduce expert evidence on the issue of obscenity is not fatal to its case, Paris, 413 U.S. at 56, or that the prosecution can rely on the jury's own knowledge of the community to determine the standards against which the materials must be evaluated, Hamling, 418 U.S. at 104, it is altogether another matter to find that the prosecution no longer bears the burden of persuasion and proof on an essential element of the offense. Given, Miller, Paris and Hamling, it is incumbent upon a trial court to instruct the jury that if it finds itself unable to determine the relevant community standards for evaluating the obscenity of the materials at issue, then the jury must acquit - for in that instance, the prosecution has failed to sustain its burden of persuasion and proof on an essential element of the offense.

CONCLUSION

For these reasons, petitioners respectfully urge this Court to accept this case for review.

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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee,	:	Case Nos. CA95-09-021
	:	CA95-09-022
- vs -	:	
JAMES KEATON, et al.,	:	*OPINION*
Defendants-Appellants.	:	8/26/96
	:	(Filed Aug. 26, 1996)

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POWELL, J. Defendants-appellants, Midwest Pride IV, Inc. ("Midwest") and James Keaton, appeal from their convictions for pandering obscenity in violation of R.C. 2907.32.

On August 20, 1993, an undercover agent of the Fayette County Sheriff's department entered the Lion's Den Adult Bookstore in Jeffersonville, Ohio and purchased two sexually oriented videotapes entitled "Carolyn Monroe X-posed" and "Climactic Scenes Number 28." The agent turned the videotapes over to the Fayette County Sheriff's Office.

On October 4, 1993, the Fayette County Grand Jury indicted Midwest, the owner of the Lion's Den, and Keaton, the general manager of the Lion's Den, on one count each of pandering obscenity. The case was tried to a jury on August 28, 1995.

On August 31, 1995, the jury found both Midwest and Keaton guilty. The trial court sentenced Keaton to six months imprisonment and imposed a $1,000 fine. The trial court fined Midwest $5,000. Appellants now appeal, setting forth the following assignments of error for review:

Assignment of Error No. 1:

THE TRIAL COURT ERRED IN PROHIBITING DEFENDANTS FROM ARGUING THAT THE CHARGED MATERIALS WERE PROTECTED BY THE FIRST AMENDMENT AND IN EXCLUDING ALL EVIDENCE PROFFERED BY THE DEFENDANTS IN THEIR CASE [-] IN [-] CHIEF.

Assignment of Error No. 2:

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY BY FAILING TO GIVE ADEQUATE INSTRUCTION ON THE CONSTITUTIONAL TEST FOR OBSCENITY AND IN REFUSING TO INCLUDE IN ITS CHARGE CORRECT, PERTINENT AND TIMELY JURY INSTRUCTIONS REQUESTED BY DEFENDANTS.

Assignment of Error No. 3:

THE TRIAL COURT ERRED IN REFUSING TO EXCUSE FOR CAUSE TWO JURORS WHO ADMITTED THEY HELD STRONG BELIEFS

AGAINST SEXUALLY EXPLICIT MATERIALS WHICH PREVENTED THEM FROM ASSUMING ROLES AS FAIR AND IMPARTIAL JURORS.

Assignment of Error No. 4:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN SENTENCING APPELLANT KEATON TO THE MAXIMUM-SIX MONTHS [*sic*] IN JAIL AND A $1,000.00 FINE.

In their first assignment of error, appellants contend that the trial court erred in prohibiting them from arguing to the jury that the sexually oriented videotapes at issue were constitutionally protected speech under the First Amendment.

While the First Amendment to the United States Constitution, through the Fourteenth Amendment, provides that a state may not abridge a person's freedom of speech, *Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 114, this protection is not absolute. *Miller v. California*, (1973), 413 U.S. 15, 23, 93 S.Ct. 2607, 2614. The United States Supreme Court has settled clearly that obscene material is afforded no First Amendment protection. *id.*

The term "obscenity" is a legal term of art, the definition of which is a question of law.[1] *Urbana* at 114 (citing *Hamling v. United States* (1974), 418 U.S. 87, 118, 94 S.Ct.

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[1] Whether any material or performance is legally "obscene" is determined in Ohio by the application of R.C. 2907.01(F). This definition is limited by the First and Fourteenth Amendments as protected via the *Miller* test discussed *infra*. *Miller* at 23-24, 93 S.Ct. at 2614.

2887, 2908). Whether materials meet the established legal definition of obscenity, however, is determined by the trier of fact. *Miller* at 24, 93 S.Ct. at 2615. In *Miller*, the United States Supreme Court articulated the following three-part test for the trier of fact to determine whether material is obscene:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest * * * ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (quoting *Kois v. Wisconsin* (1972), 408 U.S. 229, 230, 92 S.Ct. 2245, 2246).[2] See *State v. Burgun* (1978), 56 Ohio St.2d 354, 357-58.

The record in the present case shows that the trial court ruled prior to trial that appellants would "not be permitted to suggest, in the presence of the jury, that the First Amendment protects, provides a defense for, or permits the distribution of, obscene material." At no point, however, did the trial court prohibit appellants from arguing that the videotapes did not meet the legal definition of obscenity under *Miller*. The order simply

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[2] Sexual conduct is defined in Ohio as "vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex." R.C. 2907.01(A).

precluded appellants from suggesting that material meeting the legal definition of obscenity is nevertheless constitutionally protected. As the trial court ruling was in accordance with *Miller* and *Burgun*, and appellants were not barred from presenting a First Amendment defense to the pandering obscenity charges, we find that the trial court did not err in its pre-trial ruling.

Appellants also argue that the trial court erred by excluding evidence appellants proffered to show that the videotapes did not meet the *Miller* definition of obscenity. Prior to appellants' trial, three Lion's Den employees were tried for pandering obscenity in Fayette County. The juries in all three cases returned verdicts of not guilty. At trial, appellants attempted to introduce the materials alleged to be obscene in the previous cases. Appellants believed that the materials were similar to the videotapes in the instant case and argued that the previous not-guilty verdicts were based solely upon the juries' findings that the materials involved were not obscene under the *Miller* test. Thus, appellants asserted that the materials, in conjunction with the not-guilty verdicts, were relevant to show that the videotapes were not obscene. The trial court disagreed and excluded both the materials and the not-guilty verdicts.

Material comparable to the alleged obscenity at issue may be admissible as relevant to show a contemporary community standard of general acceptance of the alleged obscenity. *Womack v. United States* (D.C.C.A. 1975), 509 F.2d 368, 376-77, certiorari denied (1975), 422 U.S. 1022, 95 S.Ct. 2644. See *Womack v. United States* (D.C.C.A. 1961), 294 F.2d 204, certiorari denied (1961), 365 U.S. 859, 81

S.Ct. 826. The material is relevant only where the defendant has laid a proper foundation demonstrating that the material (1) is similar to the alleged obscenity at issue and (2) enjoys a reasonable degree of community acceptance. *Womack*, 509 F.2d at 377.

The trial court has broad discretion to admit or exclude evidence of allegedly comparable material. *Id.* at 378. An abuse of discretion is "more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Steiner v. Custer* (1940), 137 Ohio St. 448, paragraph two of the syllabus.

After review of the record, we find appellants have failed to show that the trial court abused its discretion by excluding the materials. First, the trial court reasonably could have found that the materials from the previous trials were not similar to the videotapes at issue in this case. Appellants failed to proffer the materials for inclusion into the record in the instant case, and thus the only indication before us that the materials are similar is the argument of appellants' counsel. A statement of belief of appellants' counsel is certainly an insufficient basis for this court to find that the trial court abused its discretion in this respect, as " 'slight' variations in format may well produce vastly different consequences in obscenity determinations." *Womack*, 509 F.2d at 378.

Second, the trial court could have reasonably found that appellants had failed to demonstrate that the previous juries' verdicts necessarily showed that the materials were not obscene. R.C. 2907.32 defines the offense of pandering obscenity, in part, as follows:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> * * *
>
> (2) Promote or advertise for sale, delivery or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent or provide * * * any obscene material;
>
> * * *
>
> (5) Buy, procure, possess, or control any obscene material with purpose to violate division (A) (2) * * * of this section.

R.C. 2907.32 (A) (2), (5). Our review is limited, as appellants failed to preserve the records of the prior trials for our review. It is clear, however, that only one element of the offense concerns whether the videotapes were obscene. A distinct possibility exists that the juries' verdicts were predicated on findings that the prosecution failed to prove any of the other elements of the offense beyond a reasonable doubt rather than that the materials were not obscene. Accordingly, we cannot find that the trial court abused its discretion in excluding the materials.

Ultimately, we find that the trial court did not err in ruling that appellants could not suggest that obscenity was afforded constitutional protection and in excluding the allegedly obscene materials subject to the previous verdicts. The trial court rulings did not deprive appellants of their right to introduce other evidence, including expert and lay testimony, concerning the obscenity test specified in *Miller*. See *Kaplan v. California* (1973), 413 U.S. 115, 93 S.Ct. 260; *Smith v. California* (1959), 361 U.S. 147,

80 S.Ct. 215. Accordingly, appellants' first assignment of error is overruled.

Appellants' second assignment of error alleges that the trial court erred in its instructions to the jury concerning their determination of whether the videotapes were protected by the First Amendment. When an appellate court reviews a claim that a jury instruction was erroneous, the instruction must not be viewed in isolation but in its entirety, or in the context of the overall charge. *State v. Frazier* (1995), 73 Ohio St. 3d 323, 331. In the instant case, the trial court instructed the jury regarding the *Miller* test as follows:

> The test to determine whether the material, the work, or a performance is obscene, in addition to the statutory definition which I have just given you, is a three-part test. In order for the material to be obscene, all three elements of this test must be proved beyond a reasonable doubt:
>
> (1) Whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest.
>
> (2) Whether * * * to the average person applying contemporary community standards[,] the work depicts or describes in a patently offensive way, sexual conduct as defined in these instructions.
>
> (3) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. The test for determining if material has serious literary, artistic, political or scientific value is whether a reasonable person would find such value in the material, taken as a whole.

* * *

> The term [*sic*] average person does not include any number of people, the majority, or a few, or some, but is a term [*sic*] connoting a composite or synthesis of the community. The average person is one with average sex instincts. A prurient interest is not the same as a candid, normal or healthy interest in sex, rather it is a shameful or morbid interest in nudity, sex, or excretion which goes substantially beyond customary limits of candor in description or representation of such matters.

Appellants claim that the court erred in its definition of "prurient interest," arguing that "there is no legal precedent for defining prurient interest in terms of 'nudity' or 'excretion.' " Appellants also argue that the trial court illogically defined prurient interest with reference to "candor."

The record shows, however, that the trial court instructed the jury concerning the definition of prurient interest verbatim from United States and Ohio Supreme Court decisions. See *Roth v. United States* (1957), 354 U.S. 476, 487, 77 S.Ct. 1304, 1310 n.20, citing A.L.I., Model Penal Code (Tent. Draft No. 6, 1957), 207.10(2); *Urbana*, 43 Ohio St. 3d at 116. These decisions clearly note that a prurient interest "is a 'shameful or morbid interest in *nudity*, sex, or *excretion* *** [which] goes substantially beyond customary limits of *candor* in description or representation of such matters.' " *Urbana* at 116 (emphasis added), quoting *Roth* at 487, 77 S.Ct. at 1310 n.20. As the trial court and this appellate court are bound by the legal definitions of the United States and Ohio Supreme

Courts, we find that the trial court did not err in its definition of prurient interest.

Appellants also argue that the trial court erred by failing to explain, rather than merely recite, the *Miller* test. The trial court is to instruct the jury by clearly and concisely stating the principals of law necessary to allow a fair verdict. *State v. Perryman* (1976), 49 Ohio St. 2d 14, 29. A trial court must provide full and adequate instructions to the jury on the essential elements of the crime. *United States v. Sailley* (C.A.4, 1966), 360 F.2d 699, 702; *Byrd v. United States* (C.A.D.C. 1965), 342 F.2d 939, 940-41.

In the instant case, the trial court's jury instructions concerning the *Miller* test were substantially similar to the Ohio Jury Instructions, which, in turn, were derived from the *Burgun*, *Miller* and *Urbana* opinions. See 4 Ohio Jury Instructions (1996), 507.31, Section 8. While the trial court did not explain or define each word found in the instructions, we find that such is not required. The instructions fully recited the law without misstatement and provided the jury with the information necessary to allow a fair verdict. Therefore, that trial court did not err in its instructions concerning the *Miller* test.

Appellants further argue that the trial court erred by refusing to adopt two of appellants' submitted jury instructions. To prevail upon appeal on the ground that the trial court erred by failing to instruct the jury as requested, a party must show that the instruction was correct, pertinent, and timely presented. *Cincinnati v. Epperson* (1969), 20 Ohio St.2d 59, 61; *State v. Boulabeiz* (1994), 92 Ohio App.3d 238, 241.

Appellants' fifth submitted jury instruction proposed that the jury was bound to acquit appellants had they been unable to determine community standards.[3] Appellants present no authority for this proposition.

Although "[t]he government bears the burden of proving all three elements of obscenity to the satisfaction of the trier of fact," it is not required to introduce evidence of community standards. *United States v. Various Articles of Obscene Merchandise* (C.A.2, 1983), 709 F.2d 132, 135; *United States v. 2,200 Paper Back Books* (C.A.9, 1977), 565 F.2d 566, 570. Should the government fail to introduce evidence of community standards including opinion proof, the trier of fact may choose to find that the government has failed to sustain its burden of proof or "arrive at a measure of community tolerance of pornographic material" based upon its "own experience in the community and decide as best [it] can what most people seem to think about such materials." *Various Articles* at 135.

While a jury may become deadlocked, and is also free to acquit when it is unable to determine community standards, we find no authority mandating a jury to acquit under this circumstance. See *id.* at 135-36. Hence, appellants' fifth submitted jury instruction was an incorrect statement of the law, and the trial court did not err in failing to adopt this instruction.

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[3] Appellants' fifth submitted jury instruction reads in full as follows:

> If, from the evidence offered by the State during this trial, you cannot determine the community standards in regard to explicit sexual material, you must find the defendants not guilty.

Appellants' fourteenth submitted jury instruction proposed that before the jury could render a verdict of guilty, it was required to find that defendants knew the materials were *obscene*.[4] Again, we find appellants' instruction is an incorrect statement of the law.

Some degree of scienter is required to sustain an obscenity conviction such as pandering obscenity. *Smith v. California* (1959), 361 U.S. 147, 155, 80 S.Ct. 215, 219-20. See *Burgun*, 56 Ohio St.2d at 363. R.C. 2907.32 requires the prosecution show that appellants had "knowledge of the character of the material or performance involved." R.C. 2907.32 (A). Arguing that R.C. 2907.32 requires knowledge that the materials were obscene, appellants cite to two supreme court cases in which the high court refers to "knowledge of the 'character' or 'nature' of *obscene* material," *Burgun*, 56 Ohio St.2d at 363 (emphasis added), and "knowledge that the materials in question are *obscene*." *State ex rel. Pizza v. Strope* (1990), 54 Ohio St.3d 41, 47 n.5 (emphasis added). Appellants' reliance is misplaced.

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[4] Appellants' fourteenth submitted jury instruction reads in full as follows:

> One of the essential elements the prosecution must prove beyond a reasonable doubt is the element of scienter or knowledge; that is, at the time of the alleged offense, the defendants must have had knowledge of the character of the charged * * * videotape[s]. This means that the State must prove that the defendants knew that the materials at issue were obscene. Thus if you find that the State has failed to prove, beyond a reasonable doubt, that the defendant or any one of them, knew that the materials were obscene, then you must find the defendants or any one of them not guilty.

In *Hamling v. United States* (1974), 418 U.S. 87, 94 S.Ct. 2887, the United States Supreme Court approved a trial court's instruction in an obscenity prosecution that "the defendant's belief as to the obscenity or non-obscenity of the material is irrelevant." *Id.* at 120, 94 S.Ct. at 2909. The Court stated clearly that "[t]o require proof of a defendant's knowledge of the legal status of the materials," that is, that the material is obscene under the *Miller* test, "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Id.* at 123, 94 S.Ct. at 2910-11. Further, the *Burgun* court stated that "by requiring that knowledge of the "content" of obscene material is necessary, this court did not imply that there be either knowledge of the actual content or the fact that it was *legally* obscene." *Burgun* at 363, citing *Rosen v. United States* (1896), 161 U.S. 29, 16 S.Ct. 480.[5]

Therefore, we find that the scienter requirement does not require that the prosecution prove the defendant knew that the material was obscene under the *Miller* test, but is satisfied when the defendant is in some manner aware of the sexually oriented content or character of the

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[5] We also note that appellants' reference to *Strope* cites a footnote following the final sentence of the majority opinion in which the supreme court discusses matters relating to the remand of the case. The cited phrase constitutes dicta and not syllabus law. As such, it is not controlling in the present case.

Although the phrase "obscene material" is found in the syllabus of *Burgun*, the context of the *Burgun* decision indicates that the supreme court intended "allegedly" obscene material and not material "legally defined as" obscene. Further, as noted in the text, the *Burgun* court goes on to indicate clearly that knowledge that the material is legally obscene is not required under R.C. 2907.32. *Burgun* at 363.

material. See *Ginzburg v. New York* (1968), 390 U.S. 629, 644, 88 S.Ct. 1274, 1283. As appellants' fourteenth submitted jury instruction was an incorrect statement of the law, we find that the trial court did not err in failing to so instruct the jury. Accordingly, appellants' second assignment of error is hereby overruled.

In their third assignment of error, appellants argue that the trial court erred by refusing to excuse two jurors for cause. During voir dire, prospective juror Elizabeth Smith indicated that her view on sexually explicit materials were very strong. Smith indicated that she would try to be a fair juror, set aside her personal feelings about the case and accept the law as the trial court explained. In response to questions whether she might have difficulty being fair and impartial because of her moral and religious convictions, Smith answered that she would. She was asked in spite of her views whether she would do her best to apply the law that the trial court described. She answered, "Oh, yes."

Robyn Runnels initially indicated that she could not be fair because of her moral views, that she "strong[ly] objected to those types of materials." In response to the trial court's questions, however, Runnels stated that she thought she could be fair. Runnels also stated that she would follow the law as given her by the trial court.

Crim.R. 24 (B) (9) provides that a prospective juror shall not be disqualified due to that person's "previously formed or expressed opinion with reference to the guilt or innocence of the accused" if the trial court is satisfied that the person "will render an impartial verdict according to the law and the evidence submitted to the jury at

trial." The test for prospective jurors is not whether they have views on subject matter involved; the test is whether their views will impair their judgment to the extent that they would not be able to faithfully and impartially determine facts and apply law according to instruction of the trial court. *Dayton v. Gigandet* (1992), 83 Ohio App.3d 886, 891-92.

An appellate court must not disturb a trial court ruling on a challenge for cause "unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *State v. Tyler* (1990), 50 Ohio St.3d 24, 31. An appellate court must pay deference to the trial judge who sees and hears the juror. *State v. DePew* (1988), 38 Ohio St.3d 275, 280.

While the record reflects that Smith and Runnels had strong views regarding obscenity, they should not have been disqualified by this mere fact, and we are not persuaded that they could not have been fair and impartial. Both women stated that they were open and willing to apply the law as given to them by the trial court and accepted that appellants were innocent until proven guilty.

Otherwise, the trial court decision not to exclude Smith and Runnels was not arbitrary, but was supported by substantial testimony. We find that appellants have failed to overcome the presumption that the trial court correctly ruled on appellants' request or demonstrate that the trial court abused its discretion. Appellants' third assignment of error is hereby overruled.

In their fourth assignment of error, appellants argue that the trial court abused its discretion in sentencing

Keaton to pay a $1,000 fine and serve six months imprisonment. R.C. 2929.22 provides that when imposing sentence for a misdemeanor, the trial court shall consider the risk that the offender will commit another offense, the need for protecting the public from the risk, the nature of the offense and the ability and resources of the offender. R.C. 2929.22(A). The section also states that the trial court must not impose both imprisonment and a fine "unless a fine is specially adapted to deterrence of the offense or the correction of the offender." R.C, 2929.22(E).

The trial court has discretion in imposing sentence, and in the absence of an abuse of discretion, an appellate court must not disturb a sentence. *State v. Wagner* (1992), 80 Ohio App.3d 88, 95. The statutory criteria of R.C. 2929.22 do not control the trial court's discretion; rather, the criteria provide a guide in exercising sentencing discretion. *Id.*

> Failure to consider these criteria constitutes an abuse of discretion, but when the sentence imposed is within the statutory limit, a reviewing court will presume that the trial judge followed the standards set forth in R.C. 2929.22 * * * absent a showing to the contrary.

Id. at 95-96. Thus, the burden is on appellant to come forward with evidence to rebut the presumption that the trial court considered the sentencing criteria. See *State v. Cyrus* (1992), 63 Ohio St.3d 164, 166.

Appellants have failed to demonstrate that the trial court decision in establishing the provisions of sentence in the present case was unreasonable, arbitrary or unconscionable. The sentence imposed is within the statutory limit, and nothing in the record demonstrates that the

trial court did not consider all of the provisions of R.C. 2929.22 when sentencing Keaton. We find that the trial court did not abuse its discretion, and therefore overrule appellants' fourth assignment of error.

Judgment affirmed.

WALSH, P.J., and YOUNG, J., concur.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, Plaintiff-Appellee,	:	CASE NOS. CA95-09-021 CA95-09-022
- vs -	:	
JAMES KEATON, et al.,	:	JUDGMENT ENTRY
Defendants-Appellants.	:	(Filed Aug. 26, 1996)

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

To all of which appellants, by their counsel, except.

/s/ James E. Walsh
James E. Walsh,
Presiding Judge

/s/ William W. Young
William W. Young, Judge

/s/ Stephen W. Powell
Stephen W. Powell, Judge

THE SUPREME COURT OF OHIO

1997 TERM

State of Ohio, Appellee,	:	Case No. 96-2282
v.	:	ENTRY
James Keaton et al., Appellants.	:	(Filed Jan. 15, 1997)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Berkman, Gordon, Murray and DeVan.

(Fayette County Court of Appeals; Nos. CA9509021 & CA9509022)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COMMON PLEAS COURT OF
FAYETTE COUNTY, OHIO

STATE OF OHIO, Plaintiff, vs. JAMES KEATON, and MIDWEST PRIDE IV, INC., Defendants.	:: :: :: :: :: :: :: :: :: ::	Case No. 930128 CR 930131 CR JUDGEMENT ENTRY OF CONVICTION (Filed Sep. 15, 1995)

The defendants were indicted by the Fayette County Grand Jury on October 4, 1993, and charged with Pandering Obscenity, in violation of Revised Code section 2907.32, a misdemeanor of the first degree.

The cases were consolidated for purposes of trial and on August 28, 1995, trial by jury began. Defendant James Keaton appeared before the court represented by attorney Brooke F. Kocab. Defendant Midwest Pride IV, Inc. was represented by attorney J. Michael Murray. Fayette County Prosecuting Attorney Steven H. Eckstein and Assistant Prosecutor John M. Scott, Jr. appeared on behalf of the State of Ohio. After deliberation, the jury returned its verdict on August 31, 1995, finding each defendant guilty of Pandering Obscenity, a misdemeanor of the first degree, as charged in the indictments.

On September 15, 1995, defendant James Keaton appeared before the court for sentencing represented by attorney Brooke F. Kocab, and defendant Midwest Pride IV, Inc. was also represented by Ms. Kocab. Fayette County Assistant Prosecuting Attorney John M. Scott, Jr.

was present on behalf of the State of Ohio. Attorney Brooke F. Kocab spoke on behalf of defendant James Keaton and he was provided an opportunity to speak on his own behalf. Ms. Kocab also spoke on behalf of defendant Midwest Pride IV, Inc. There being nothing presented as to why sentence and judgement should not be imposed, sentence and judgement was pronounced as follows: for the offense of Pandering Obscenity, in violation of Ohio Revised Code section 2907.32, a misdemeanor the first degree, the defendant James Keaton is sentenced to six months in the Fayette County Jail and ordered to pay a fine of one thousand dollars ($1,000.00), and defendant Midwest Pride IV, Inc. is ordered to pay a fine of five thousand dollars ($5,000.00).

The court then advised the defendants of their appellate rights pursuant to Ohio Criminal Rule 32(A)(2).

Costs of prosecution are taxed against the defendants, and judgement is hereby rendered against each defendant for such costs and the fine herein imposed.

Defendant James Keaton is ordered to appear at the Fayette County Jail at 6:00 p.m. on September 18, 1995, to begin serving his sentence. The court finds that the defendant has not been incarcerated prior to sentencing.

/s/ Victor Pontious
Victor Pontious, Jr.
Judge

Copies of this entry were sent or delivered this filing date to:

Attorney for Plaintiff: Steven H. Eckstein
Attorney for Defendant James Keaton: Brooke F. Kocab
Attorney for Defendant Midwest Pride IV, Inc.: J. Michael Murray

/s/ Kristin Johnson
Assignment Clerk

IN THE COURT OF APPEALS OF
FAYETTE COUNTY, OHIO

STATE OF OHIO, Appellee, vs. JAMES KEATON and MIDWEST PRIDE IV, INC., Appellants.	:	CASE NO. CA95-09-021 CA95-09-022 ENTRY DENYING APPLICATION FOR RECONSIDERATION (Filed Oct. 3, 1996)

The above cause is before the court pursuant to an application for reconsideration of this court's August 26, 1996 opinion filed by counsel for appellants, James Keaton and Midwest Pride IV, Inc., on September 5, 1996. The test generally applied when ruling on an application to reconsider is whether the application calls the court's attention to an obvious error in its decision or raises an issue for consideration which was either not considered at all or not fully considered when it should have been. *Matthews v. Matthews* (1982), 5 Ohio App.3d 140. An application for reconsideration should not be granted unless a vital question is raised which would require a different decision by the court. See *Nickerson v. Nickerson* (1949), 85 Ohio App. 372.

Upon consideration of appellants' application, the court finds that all of the issues raised by appellants were considered and addressed in this court's August 26, 1996 opinion.

Accordingly, appellants' application for reconsideration is DENIED.

IT IS SO ORDERED.

/s/ William W. Young
William W. Young, Judge

/s/ Stephen W. Powell
Stephen W. Powell, Judge

IN THE COURT OF COMMON PLEAS
FAYETTE COUNTY, OHIO

STATE OF OHIO,	:	Case no. 930128 CR
Plaintiff,	:	JOURNAL ENTRY
v.	:	(Filed September 1, 1994)
JAMES KEATON,	:	
Defendant.	:	

Several motions have been filed by the parties in this matter.

Defendant's Motions

In his motion for an order compelling discovery, the defendant contends that the prosecution responded ambiguously concerning whether the defendant made a statement. The State's response to defendant's request for discovery, however, indicates that no written or recorded statement was obtained from the defendant, and that no oral statements have been summarized. The court finds that such a response is not ambiguous. Defendant's motion for an order compelling discovery is overruled.

In his second motion for a Bill of Particulars, the defendant argues that the Bill of Particulars provided by the prosecutor is not responsive to defendant's request and fails to meet the requirements of Criminal Rule 7(E). The court finds that the Bill of Particulars adequately specifies that nature of the offense charged as well as the alleged criminal conduct of the defendant. Defendant's second motion for a Bill of Particulars is denied.

Defendant contends that the statutes forming the basis of the indictment are unconstitutionally vague and overbroad. The defendant maintains that Ohio's obscenity statutes "impermissibly attempt to prohibit noncommercial use or possession of obscene material." The defendant is charged with Pandering Obscenity in violation of Revised Code section 2907.32(A)(5). This section of the Code prohibits the purchase, sale, or control of any obscene material for the purpose of sale or public display. The court finds that the defendant's contention is immaterial since the defendant is not charged with private possession of obscene material.

The defendant also argues that Ohio's obscenity statutes are not in conformity with Article 1 Section 10 of the Ohio Constitution because the statutes "prohibit the dissemination of expressive materials that have some social value." This argument is essentially that Ohio should adopt the definition of obscenity set forth in *Roth v. United States,* 354 U.S. 476 (1957), rather than the less restrictive definition approved in *Miller v. California,* 413 U.S. 15 (1973). The Ohio Supreme Court, however, has accepted the Miller test for defining obscenity. *State v. Burgun,* 56 Ohio St.2d 354 (1978). Accordingly, the court finds defendant's motion to dismiss the indictment on grounds of unconstitutionality of Ohio's obscenity statutes not well taken and the same is overruled.

Finally, the defendant requests that the indictment be dismissed because the material alleged to be obscene is not identified therein. Criminal Rule 7(B) provides that an indictment may be "in words of the applicable statute . . . or in any words sufficient to give the accused notice of all the elements of the offense with which he is

charged." The indictment charges that, in violation of Revised Code section 2907.32(A)(5), the defendant, "with knowledge of the character of the material involved, controlled obscene material with the purpose to sell said obscene material." The indictment is stated in the words of the pertinent statute. The court finds that identification of the obscene material is not an essential element of the offense of Pandering Obscenity and need not be set forth in the indictment. The court further finds that the indictment adequately notifies the defendant of all the essential elements of the offense charged, and that the defendant's constitutional right to be informed of the nature of the accusation is satisfied where the indictment and the bill of particulars set forth in sufficient detail the defendant's alleged criminal conduct. Defendant's motion to dismiss the indictment is overruled.

Plaintiff's Motions

The State has requested that defense counsel's statements to the jury during voir dire be restricted in several respects. The State contends that hypothetical and technical legal questions concerning a juror's understanding of such legal concepts as "community standards," "average person," or "prurient interest," are improper because they are asked in an attempt to indoctrinate the jury panel. The State also argues that questions to an individual juror about that juror's personal beliefs and opinions concerning offensive sexually explicit material tend to mislead, intimidate, or offend prospective jurors and should be disallowed.

Ohio Criminal Rule 24(A) provides that a person called as a juror "shall be examined under oath or upon affirmation as to his qualifications." Rule 24(B) lists fourteen reasons for which a prospective juror may be challenged. The Ohio Supreme Court has long recognized the importance of a complete voir dire examination in order to determine whether there exists a statutory reason to challenge a particular juror. *State v. Huffman*, 86 Ohio St. 229 (1912). Hypothetical questions which seek to elicit from a juror what that juror's decision would be under certain factual situations, however, are improper. Id.

Likewise, the court finds that questioning a potential juror about his or her personal, religious, or political beliefs, and whether those beliefs could possibly affect the juror's opinion as to obscenity, is not proper voir dire examination. *Hamling v. United States*, 418 U.S. 87 (1974). Any questions to jurors designed to embarrass of humiliate the jury panel will be prohibited.

The State also contends that it is improper during voir dire examination to ask questions which concern the right of sexually explicit adult businesses to operate or which indicate that the material is sold only to consenting adults. The United States Supreme Court has held that pornographic material is not immune from state regulation simply because it is shown to consenting adults. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

The State argues that the court should prohibit questions to a prospective juror which relate to the right of "freedom of expression," or which contradict the rule that the right to possess obscene material in the privacy of the home, does not create a right to distribute or

receive it. The court finds that such questions are not appropriate because they are not relevant to the issues in this case and would likely cause confusion among the jury panel.

For the reasons set forth above, the State's motion for a protective order with respect to voir dire examination is granted.

The State also requests a protective order prohibiting the defense from introducing any alleged comparable material. In affirming a trial court's refusal to admit allegedly comparable materials in a federal obscenity case, the United States Supreme Court noted that the availability of such materials in the community is of little, if any probative value. *Hamling v. United States*, 418 U.S. 87 (1974).

The State has also requested five additional protective orders. First, the State argues that opinion polls and expert testimony should be prohibited on the issues of "prurient interest, or patent offensiveness, under contemporary community standards, or . . . serious literary, artistic, political, educational or scientific value." It is apparent that the prosecution is not required to produce expert testimony as to obscenity, in order to sustain a conviction. *Hamling v. United States*, 418 U.S. 87 (1974). However, the court is of the opinion that a blanket exclusion of such evidence before the same is proffered would be inappropriate.

Second, the State requests that defense counsel be prohibited from stating, in the jury's presence, that it is a defense to the crime of pandering obscenity that the material was only rented or sold to consenting adults.

The court finds that such a defense is immaterial. Accordingly, the State's request for a protective order with respect to this issue is granted.

Third, the State contends that it is improper for defense counsel to suggest, in the presence of the jury, that the right to privacy, or the right to possess obscene material in the home, gives anyone, including the defendant, the right, to distribute or receive such material. The court finds that such a statement by defense counsel would be contrary to law and misleading. The State's request for a protective order on this matter is granted.

Fourth, the State argues that defense counsel should not be permitted to suggest, in the presence of the jury, that the First Amendment protects, provides a defense for, or permits the distribution of, obscene material, or the freedom of expression is relevant with respect to obscenity. It has long been held that the First Amendment does not protect obscene material. *Miller v. California*, 413 U.S. 15 (1973). The State's request for a protective order concerning this issue is granted.

Fifth, the State contends that defense counsel should be prohibited from stating, in the jury's presence, that it is a defense to the crime of distributing obscene material that the defendant did not know that the material was obscene. This issue was considered in *Hamling v. United States*, 418 U.S. 87 (1974). In Hamling, the Supreme Court approved a trial court's instruction in a federal obscenity prosecution that the defendant's "belief as to the obscenity or nonobscenity of the material is irrelevant." Id. at 120. Accordingly, the State's motion for a protective order with respect to this matter is granted.

The State has also requested that the jury be permitted to view the premises. The court finds said motion well taken and the same is granted.

/s/ Victor Pontious
Victor Pontious, Jr.
Judge

Request For Jury Instructions And Objections To Court's Jury Instructions: Volume III, Pages 641-43; 724-24

* * *

[p. 641] information that they need to have in order to decide this case without prejudicing the rights of the defendant. Because no intelligible definition of prurient will be included in this instruction.

JUDGE: Respectfully your objections overruled.

MURRAY: Then uh, we object to the refusal to give defendant's request to jury instruction number one which we think is a correct statement of law. I've already mentioned number two. We object to the failure to give uh the instruction requested as number three to the extent that it hasn't been included in the court's instructions. We further believe that uh the courts instructions are insufficient to give the jury the information it needs to know. It doesn't tell the jury what contemporary community standards are for example. Or how they're to arrive at them. Or how they're to measure them. It tells them nothing about that and I think that defendants request to jury instruction number three would uh correctly communicate that kind of information. Uh we object to the failure to include number four.

JUDGE: Excuse me Mr. Murray you have given us eighteen instructions. I assume that any of the [p. 642] instructions I didn't give you object to. So to speed up this inquiry I will allow you to say we object to any of the instructions that we submitted that you did not give.

MURRAY: I appreciate that your Honor. But I would like in making the record to quickly as possible make a couple comments about a couple of them at least.

JUDGE: Well, five more minutes. Go ahead.

MURRAY: Um, the instructions that, that talk about for example number five which uh informs the jury that if they cannot determine the community standards they must find the defendants not guilty. We believe those kinds of instructions are uh some instruction to that effect is constitutionally uh, required. And beyond that your Honor we would uh be satisfied if your Honor is the record is clear that we object to the extent that the court has failed to give any of our requests of instructions. We object to that.

JUDGE: Okay. Any other comments about the instructions?

KOCAB: Your Honor I would obviously join in Mr. Murray's objections and the comments that were previously made. I, I would request that the jury be advised that they have to have a unanimous verdict of on [p. 643] the issue of obscenity.

JUDGE: Beg your pardon?

KOCAB: Well the instruction is that they can find both materials obscene one material obscene, and if that's the case they should told that they need to find the same material obscene by a unanimous verdict so that as we discussed during the ben, at the bench several days ago if six of them don't find one item obscene and six find another obscene it cannot result in a verdict of guilt. I think they need to be told that someplace.

JUDGE: I don't know how to tell people that. That's why paragraph si on page six we simply state you will separately consider the evidence as presented to each defendant and as to each videotape.

KOCAB: Well then I would object to your failure to do that with all due respect.

JUDGE: I mean if they're going to sign a verdict of guilty it means they agree that the materials obscene. They, they simply. . . .

KOCAB: I don't know. . . .

JUDGE: I don't see how anyone could sign a guilty verdict and say I don't think it's obscene but I'm gonna sign a guilty verdict.

* * *

[p. 724] possession the exhibits and the verdict forms. The foreman or forelady will retain possession of these records, including the verdict, and return them to the courtroom. The foreman or forelady will see that your discussions are orderly and that each juror has the opportunity to discuss the case and to cast his or her vote; otherwise, the authority of the foreman or forelady is the same as any other juror. Until your verdict is announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict. Does counsel desire anything further at this time?

ECKSTEIN: Nothing from the State your Honor.

MURRAY: Yes just one thing your Honor.

Side Bar

MURRAY: Your Honor I would just like to renew all previously state objections to the Court's charge and it's failure to ah submit the requested jury instructions of the defendants.

KOCAB: Your Honor I would join in that and also point out that I thought you were going to give a definition of purposely also. Which also is not in here and I also don't believe even though it might not seem [p. 725] . . . it might seem kinda silly coming from me but I don't think you told them it had to be a unanimous verdict.

JUDGE: I'm not finished yet.

KOCAB: Oh good.

MURRAY: I join in that. Thank you Judge.

Side Bar Ends

JUDGE: After you retire select a foremen or forelady and whenever all eight- I repeat, all eight jurors agree upon a verdict, you will sign the verdict in ink and advise the bailiff by knocking on the door. You will then be returned to the courtroom. You may know retire to the jury room to deliberate. Take your instructions with you.

Jury leaves.

JUDGE: We have a question from the jury. What is the definition of community as it is used in the law? Does it mean in the country, the state, the county or city? We talked about this in chambers. Mr. Eckstein?

ECKSTEIN: Thank you your Honor. The State was in agreement with the initial response that the Court made but upon further reflection has . . . wishes to be heard more fully on the matter. We refer to specifically

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FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN PROHIBITING DEFENDANTS FROM ARGUING THAT THE CHARGED MATERIALS WERE PROTECTED BY THE FIRST AMENDMENT AND IN EXCLUDING ALL EVIDENCE PROFFERED BY THE DEFENDANT IN THEIR CASE IN CHIEF.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY BY FAILING TO GIVE ADEQUATE INSTRUCTION ON THE CONSTITUTIONAL TEST FOR OBSCENITY AND IN REFUSING TO INCLUDE IN ITS CHARGE CORRECT, PERTINENT AND TIMELY JURY INSTRUCTIONS REQUESTED BY DEFENDANTS.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN REFUSING TO EXCUSE FOR CAUSE TWO JURORS WHO ADMITTED THEY HELD STRONG BELIEFS AGAINST SEXUALLY EXPLICIT MATERIALS WHICH PREVENTED THEM FROM ASSUMING ROLES AS FAIR AND IMPARTIAL JURORS.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN SENTENCING APPELLANT KEATON TO THE MAXIMUM-SIX MONTHS IN JAIL AND A $1,000 FINE.

PROPOSITION OF LAW NO. 1

IN AN OBSCENITY PROSECUTION, THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO OFFER EVIDENCE THAT COMPARABLE WORKS SOLD BY EMPLOYEES AT THE VERY STORE IN QUESTION WERE FOUND BY PRIOR JURIES IN THE COUNTY TO BE NOT OBSCENE, AND IF A TRIAL COURT PREVENTS THE DEFENDANT FROM INTRODUCING SUCH EVIDENCE, A PROFFER DESCRIBING THE EXPRESSION AND THE BASES FOR THE PRIOR JURY VERDICTS IS SUFFICIENT TO ALLOW AN APPELLATE COURT TO REVIEW THE PROPRIETY OF THE TRIAL COURT'S EXCLUSION OF SUCH EVIDENCE.

PROPOSITION OF LAW NO. 2

IN AN OBSCENITY PROSECUTION UNDER R.C. §2907.32, THE ACCUSED, UPON TIMELY WRITTEN REQUEST, IS ENTITLED TO A JURY INSTRUCTION TO THE EFFECT THAT TO PROVE THE ACCUSED KNEW THE CHARACTER OF THE CHARGED MATERIALS, THE PROSECUTION MUST PROVE THAT THE ACCUSED KNEW THE MATERIALS AT ISSUE WERE OBSCENE.

PROPOSITION OF LAW NO. 3

IN AN OBSCENITY PROSECUTION, THE DUE PROCESS AND JURY TRIAL CLAUSES OF THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE THE TRIAL COURT TO EXPLAIN, BEYOND THE MERE RECITATION OF IT, THE *MILLER* TEST FOR OBSCENITY.

PROPOSITION OF LAW NO. 4

IN AN OBSCENITY PROSECUTION THE ACCUSED, UPON TIMELY WRITTEN REQUEST, IS ENTITLED TO A JURY INSTRUCTION TO THE EFFECT THAT IF THE JURY IS UNABLE TO DETERMINE THE CONTEMPORARY COMMUNITY STANDARDS, IT MUST RETURN A VERDICT OF NOT GUILTY.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the

Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

OHIO REV. CODE

2907.32 Pandering obscenity

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Promote or advertise for sale, delivery, or dissemination; sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, publicly disseminate, publicly display, exhibit, present, rent, or provide, any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise or promote an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Buy procure, possess, or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

2907.01 Definitions

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering,

or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.